IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 807.

MALCOLM H. MACBRYDE, JR., ETC., ET AL.,
Petitioners,

vs.

ALICE D. PARKER, ETC., ET AL.

No. 808.

MALCOLM H. MACBRYDE, JR., ETC., ET AL.,
Petitioners,

vs.

JOHN W. DAVIDGE, ETC., ET AL.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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OPINIONS BELOW.

The opinion of the United States District Court for the District of Maryland (R. 8-28) is reported in 45 Fed. Supp. 451. The opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 37-46) is not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 30th, 1942 (R. 46). The petition for writs of certiorari was filed March 11, 1943. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by Act of February 13, 1925.

STATEMENT OF FACTS.

The only facts which are essential are:

1—Item "Second" of the will of Mary Donaldson provides:

> "Second: To my niece, Sara J. Parker, I give and bequeath the sum of Five Thousand Dollars ($5,000) absolutely; and the additional sum of Ten Thousand Dollars ($10,000) for and during her natural life and after her death I bequeath the said Ten Thousand Dollars ($10,000) to her brothers and sister of the whole blood in such proportions as she may designate by her last will and testament, but should she die intestate the said sum of money shall be divided among them equally." (R. 1)

2—The brothers and sister of the whole blood of Sara J. Parker living both at the time of the execution (1917) of the will of Mary Donaldson and her death (1920) were the same persons namely, Robert B. Parker, Henry P. Parker, LeRoy Parker and Mary D. Winder, and both parents of these parties died prior to the execution of the will (R. 4).

3—The pertinent portions of Sara Parker's will, dated March 23, 1927 are:

> "The fund of ten thousand dollars, under the will of my aunt Mary Donaldson (which said will is now of record among the Records of the Orphans' Court of Baltimore City), which I was to enjoy for life with

the right of disposition to my brothers and sister at my death, I give and bequeath in equal parts to my brothers LeRoy Parker and Robert B. Parker and my sister Mary D. Winder.

* * *

"All the rest and residue of my estate I give and bequeath to my brothers LeRoy Parker and Robert B. Parker and to my sister Mary D. Winder, share and share alike. I constitute and appoint Paul M. Burnett the executor of this my last will and testament" (R. 2 and 3).

4—Henry died February 15, 1925, Robert on August 2, 1940, Sara on November 12, 1940 and LeRoy on February 12, 1941. Mary Winder is still living (R. 4).

The Trial Court held "the appointment of Robert to a share ineffective" (R. 18) and awarded the whole fund to LeRoy and Mary Winder who survived Sara Parker (R. 26).

The Circuit Court of Appeals held "that the exercise of the power in the Parker will was totally ineffective", and reversed and remanded (R. 46) with the result that each of the four interests would receive a one quarter share under the will of the original testatrix, Mary Donaldson.

ISSUE PRESENTED.

The question at issue, therefore, is the effect of an ineffective exercise of a power of appointment and the sole reason assigned by Petitioners for seeking the issuance of writs of certiorari is that the Circuit Court of Appeals in holding that the exercise of the power was totally ineffective decided an important question of local (Maryland) law in a way probably in conflict with applicable local decisions.

ARGUMENT.

I. No Question of Importance Is Presented.

The petition discloses no special or important reason recognized by this Court as a proper occasion for the allowance of writs of certiorari.

No important question, except to the parties themselves, is involved in this case for several reasons.

First: The primary question is one of the construction of the two wills above referred to and giving effect to the intentions of the testatrices as shown therein. It is recognized in Maryland that a precedent in the construction of one will usually is of little importance in the construction of another. The reason for this is succinctly stated in *Nicodemus National Bank v. Snyder*, 178 Md. 140, 145: "It has been said that no will has a twin brother, this one is no exception."

Second: The unusual occurrence of a case of this character is clearly shown by the opinion of the District Court, which states (R. 20): "It is to be noted that no Maryland case has dealt with this particular factual situation." Mere novelty in an old field, we submit, is an indication not of importance, but of lack of importance.

The very novelty of this case also indicates that the Petitioners are mistaken in characterizing the power of appointment here involved as "customary" (Petition, p. 5).

Third: Whatever the field of law covering the subject of testamentary powers of appointment may have been in the past, it is likely to become less important in the future due to the provisions of the recent Act of Congress making property subject to powers of appointment includable, except as specified in the Act, in the estates of decedent donees of such powers, and therefore taxable in the estates

of both donors and donees. In other words, there will be fewer powers of appointment because of this Act. See Internal Revenue Code, Section 811 (f), as amended by Revenue Act of 1942, Sections 402 (a) and 403, as amended by P. L. 807—77th Congress (1942).

II. Since There Is No Maryland Case Directly In Point, Conflict of Decision Is Impossible.

The decision can not be in conflict with the Maryland decisions because there is no Maryland decision directly in point. The trial Judge, who decided the case in favor of the Petitioners, said:

> "The further question is then presented whether the naming of Robert in the will of Sara J. Parker is to be treated under the circumstances (1) as a mere nullity, thus giving the whole of the fund to the others named in equal shares, or (2) as a partial non-execution of the power with the result of (a) making the exercise of the power wholly invalid so that the whole fund devolved upon the four interests vested at the death of Mary Donaldson, or (b) only partially invalid with the result that only the one-third share appointed to Robert so devolved; or (c) with the result that, as the appointment could only validly be made by Sara to members of the class living at her death, the one-third unappointed share must also be equally divided between the two survivors at her death.
>
> "This is a question which is not free from difficulty of solution under the Maryland decisions, there being no Maryland case that presents a similar situation" (R. 18-19).

And again, he said:

> "But, as has been observed, it is to be noted that no Maryland case has dealt with this particular factual situation, and I fail to find in the Restatement any parallel case" (R. 20).

On the score of conflict of decision, the petition really raises no issue except whether or not the Circuit Court of Appeals correctly determined which Maryland cases were most nearly in point to control its own decision.

The above quotation also disposes, we think, of Petitioners' contention on page 17, that these remarks of the trial Judge were limited to the proper disposition of the one-third share appointed to Robert.

III. The Decision of the Circuit Court of Appeals Is Correct.

The Circuit Court of Appeals considered the case under two different methods of approach. Under each it found the exercise by Sara Parker of the power conferred upon her to have been wholly invalid, and accordingly it held that the fund in controversy passed by virtue of the will of the original testatrix in equal shares to the four beneficiaries, including the estates of the two who died before the donee of the power. In so doing, it rejected the claim of Robert Parker's estate to one-third of the fund, but upheld the claims of Robert's and Henry's estates to one-fourth each of the fund.

A. *The One Alternative.*

One of the Respondents contended in both the District Court and in the Circuit Court of Appeals that though the general rule was that a donee could not appoint to a person who was dead, such rule did not apply in this case because Mary Donaldson had made a direct gift of a vested remainder to the three brothers and one sister of Sara Parker coupled with a power in the latter merely to appoint the proportions in which they took, as distinguished from the gift of a power to the donee to give (R. 40). The

trial Court rejected this contention (R. 40). The Circuit Court said that it was not necessary to decide the point for even if the Respondent's contention were sound, Robert's executrix' claim for one-third was properly rejected for if Robert, though dead, were a proper object in whose favor the power might be exercised, then by the same token, Henry, though dead, could not be excluded, the power being a non-exclusive one (R. 40-41).

This involves no conflict with the rule quoted by the Petitioners from A. L. I. Restatement of Property, Sec. 361, to the effect that the death of an object of a non-exclusive power prior to the death of the donee does not defeat an appointment to surviving objects of the power. It is simply a holding that *if* (which the Circuit Court of Appeals did not decide) this case presented an exception to the rule that deceased persons cannot be included as appointees in the exercise of a power, then Henry as well as Robert would have to be included.

The Petitioners' criticism of this holding, on pages 15 and 16, to the effect that the Circuit Court held that the exercise of the power was invalid because the donee failed to name one of the appointees "who was totally ineligible, and who if included must be excluded" appears to be based upon an entire misconception of the Court's opinion, since what the Circuit Court said on this point was directed solely to rejecting the claim of the respondent, Robert Parker's executrix, to one-third of the fund.

B. The Other Alternative.

On the other hand, if the exercise of the power of appointment is ineffective for the reasons given by the trial Court, then the decision of the Circuit Court of Appeals is in accord with the Maryland cases nearest in point,

namely, *Myers v. Safe Deposit and Trust Company*, 73 Md. 413, and *Reed v. MacIlvain*, 113 Md. 141.

In the former, the donee exceeded the power given her by creating a trust, which she had no authority to do, as to part of the property subject to the power. The Court in that case said (73 Md. 413, 423):

> "If by following that statement of the law [that well appointed portions ordinarily stand] made by Mr. Sugden we would defeat the manifest intention of Charles Myers [the donor] in respect to his estate, and also the whole scheme and purpose of the will of Mrs. Myers, the donee of the power, we do not think we ought to do such violence to the intentions of those testators."

In *Reed v. MacIlvain* where the donee violated the rule against perpetuities in appointing a part of the property subject to the power, the Court approved and followed the Myers case, and after quoting from that case to the effect that it would better meet the wishes of both testators to treat the attempted exercise of the power as wholly abortive, said, at page 148:

> "To no case could the foregoing language be more forcibly and justly applied than the one now before us where to hold otherwise would be to introduce a shocking inequality between children of the donee of the power apparently equally meritorious and dear to her."

The Circuit Court of Appeals, after referring to these two cases (R. 43-45) and to *Graham v. Whitridge*, 99 Md. 248 (R. 45) and noting that there was blending of assets of the donor's estate with assets of the donee's estate in the two former cases and that there was no such blending in the Graham case (R. 46) and after further noting that

blending was discussed in *Graham v. Whitridge*, in connection with the equitable doctrine of election, said:

> * * * *"This doctrine has not been invoked by any party in the pending case;* and it is clear from a careful examination of the two cases in which total invalidity was declared that the result depended not on the blending of assets but upon the determination of the Court to effectuate as far as possible the intention of the Testatrix." (R. 46) (Italics supplied).

Judge Soper's opinion is, therefore, not only in full accord with *Myers v. Safe Deposit* and *Reed v. MacIlvain* but is not at all in conflict, as alleged by petitioners on page 14, with that portion of the opinion in the latter case wherein the Court said, in referring to the case of *Graham v. Whitridge* that had the donee blended her estate with that of the donor it would have been held that her attempted exercise of the power was wholly abortive. The reason for this statement is perfectly plain. There are two exceptions to the rule that where one part of an appointment is ineffective, and another part would, if standing alone, be effective, the latter is given effect except (1) where there is a mingling or blending, or (2) where the donee's scheme of disposition is more closely approximated by holding the exercise of the power wholly abortive. (R. 41-42). See Restatement—Property—Future Interests, Sec. 362.

It is also to be noted that the Court of Appeals of Maryland in *Reed v. MacIlvain* did not say that only if there were blending could the exercise of a power be held to be wholly abortive, but only that if there had been blending in *Graham v. Whitridge* that case would have been decided the other way.

And the quotation on page 14 of the petition taken from *Graham v. Whitridge* refers to the doctrine of election,

as appears from reading pages 285 to 288 of that case. As pointed out by Judge Soper (R. 46) "that doctrine has not been invoked by any party in the pending case."

In connection with the cases of *Myers v. Safe Deposit* and *Reed v. MacIlvain,* and if it be of any importance, the Respondents did not at any stage of proceedings abandon their alternative position of relying on these cases, as suggested by the Petitioners on page 6 of the petition, as appears from the motion filed by them for a new trial, in which it was stated:

> "These defendants also respectfully adhere to each and every argument advanced by brief and oral argument at the trial of this case, *including the argument based upon Myers v. Safe Deposit and Trust Company,* 73 Md. 413." (R. 30) (Italics supplied).

Of the case of *Smith v. Hardesty,* 88 Md. 387, referred to by the Petitioners on page 10, the Court of Appeals of Maryland in *Allder v. Jones,* 98 Md. 101, 108 said:

> "All that was decided in the case of *Smith v. Hardesty,* is, that under the power to devise to the child or children of the donor, the donee had no power to devise the property to a grandchild and charge the property so devised with the payment of a legacy to the appointor's sister."

IV. Rebuttal.

The cases cited on page 5 of the petition of *Rhulin v. New York Life Insurance Company,* 304 U. S. 202, 205 and *Fidelity Trust Company v. Field,* 311 U. S. 169, 177, ostensibly to support the proposition that the instant case is governed by the local law, which nobody disputes, are both cases in which certiorari was granted. However, on the latter point they are inapplicable to the instant case. In the former case, certiorari was granted because of a

conflict of circuits. In the latter, the Circuit Court of Appeals took the view that they were not bound by the pronouncements of state courts other than state courts of last resort. Upon certiorari being granted this ruling was held to be erroneous. Obviously, this has no application to the instant case.

See also *West v. A. T. & T. Company*, 311 U. S. 223, in which a Circuit Court of Appeals held that it was not bound to follow the decision of an intermediate appellate court of the state and so was free to adopt and apply what it considered to be the better rule. The Court said at page 237:

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

In the case at bar the Circuit Court of Appeals gave over two pages (R. 43-46) of its opinion to the consideration of the three cases in Maryland, namely, *Myers v. Safe Deposit, Graham v. Whitridge* and *Reed v. MacIlvain*, having to do with the results flowing from an ineffective exercise of a power of appointment and came to the conclusion, rightly we submit, that the instant case more nearly resembled the cases of *Myers v. Safe Deposit* and *Reed v. MacIlvain* and in consequence held the exercise of the power wholly ineffective.

V. Conclusion.

The decision of the Circuit Court of Appeals is correct and presents neither a conflict with the Maryland decisions nor a question of substance or general importance. The petition should be denied.

Respectfully submitted,

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March 19, 1943.